(4)



Number 84-718

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1984

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Robert L. Mendenhall, Petitioner,

vs.

The United States of America,
The United States Department of the
Interior, and Cecil D. Andrus,
Secretary of the Interior and
Edward F. Spang, State Director of the
Nevada Office of the Bureau
of Land Management, Respondent.

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**Appendix to Brief Amicus Curiae of
Wayne Winters, editor and publisher
Western Prospector and Miner**

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Appendix I

WAYNE WINTERS CHRONICLE

OF

INVALIDATION PROCEEDINGS

AGAINST OVER 5000 CLAIMS

AND THE

RESULTING LOSS OF LIVES AND DEMORALIZATION

OF

WESTERN GOLD MINERS

Wayne Winters being first duly sworn deposes and says that the following notes came from the files of the Tombstone Epitath and the Western Prospector and Miner. The stories below are true and factual to the best of my knowledge as a professional journalist.

**In the period between Sept. 23, 1970 and March 31, 1976,** the Federal Government through the Forest Service and the BLM brought validity contests against 4,770 mining claims in 160 separate contest actions. The small miner on the public

lands has been the chief victim of this sweep by the BLM and the Forest Service. No contest involved claims held by major--or even large, mining firms. Most of the contests were not defended, due in main by the inability of individuals to afford the expense of legal counsel.

**Denny Mining District, California**

In September of 1976 Forest Service mineral examiners, backed by Deputy U.S. Marshals and a Forest Service team of between 10 and 16 heavily armed men carrying automatic weapons and sawed-off shotguns, conducted a "mineral examination" a day for 18 days on unpatented mining claims in the Denny, California mining district.

The Upgrade unpatented mining claim is located at Denny, in northern California. It has been owned since 1975 by Lynn A. Weber. His son-in-law David Jones and wife

Veronica lived in a small cabin on the property. Jones supported them by dredging gold on the claim in 1980 and 1981.

A "mineral examination" was made by Forest Service employees on the Upgrade property in 1978. The examiner's report stated that he only recovered eight cents worth of gold per cubic yard of material processed. The claim was declared invalid for lack of discovery.

Independent experts familiar with the Upgrade Claim stated that they calculate there are 51,000 yards of gravel on the property that will run $9.00 per cubic yard and that in excess of $450,000 in gold can reasonably be expected to be recovered from the claim.

On December 14, 1981 Dave Jones, his wife and their two-month-old son, Noah Jeremiah, were living in the little cabin on the claim. The weather was very cold and as is customary in the district, mining

was shut down until the return of warm weather in the Spring.

That day 14 men led by Big Bar District Ranger David Wright arrived at the Upgrade Claim and gave Jones and his family 15 minutes to remove their belongings. Not only did this team of Government employees armed with high-powered rifles and sawed-off shotguns destroy the family's shelter, but they sought out the suction dredge, sprinkled an inflammable liquid over it, and set it afire.

Jones was known among his fellow miners as a clean, honest, hard-worker who had no troubles with the law enforcement people and who supported his family by mining gold on the Upgrade Claim. He received no assistance from food stamps or other welfare sources.

**Ruth Matapan gold placer**

In civil action #S-80 593 MLS, U.S. Court of Appeals for 9th Circuit, Mineral Examiner (Forest Service) Emmett Ball failed to notify mining claimant Jim Sette of his intention to conduct a sampling for mineral validity on the Ruth Matapan claim. The examiner with two Forest Service employees, Harry Frey and Tom Neenan, entered the claim with no witnesses present to represent the owner, and took five pounds of material as a sample of the mineral contained within the boundaries of this claim. The Forest Service had this sample assayed, and decided that the claim did not contain enough values to constitute a discovery of valuable mineral.

At a recent mining claim hearing at Redding, California, relative to a con tested claim held by Dave McMullen, Forest Service mineral examiner Ball testified under oath that he could go out on a 20-

acre mining claim, "eyeball" it and tell if there is any gold on the property; so the fact that Ball needed any sample at all to invalidate the Ruth Matapan claim is noteworthy.

Earlier the Forest Service had agreed to issue a patent to the claim. A Forest Service appraisal report states, "Between the years of 1933 and 1935 approximately $12,000 worth of mineral was removed from this claim." This would amount to 343 ounces at the $35 per ounce figure, or $120,050 at today's $350 price. Nevertheless, Ball reported that he failed to find mineral of sufficient value for a prudent man to pursue.

**Plumas National Forest, California**

The Charlotte-Butch-Dogwood Placer Mining Claim on the Middle Fork of the Feather River 15 miles from Quincy, California, had been owned and mined by

Bill Jacks for 30 years when it was contested by the Forest Service in 1976.

Forest Service mining engineer Henry W. Jones of Quincy testified in a 1976 contest hearing that the claim was invalid due to lack of a discovery. Gerald E. Gould, regional mining engineer for the Forest Service said, "We've taken action against 20 or 25 such claims--there must be a hundred or more like them--since 1968. There are more (actions) to come."

**Santa Cruz County, Arizona**

On February 15, 1968, during the hearing in the contest of the Oro Escondido unpatented mining claim owned by myself, Wayne Winters, Vern Bernard Molander testified that on October 28, 1965 he and his son were hunting deer in the area. They saw black smoke rising from behind a hill and thinking that perhaps a motor vehicle had overturned and persons might be in need of aid, they proceeded toward it.

Before reaching the site from which the smoke was coming they met a Forest Service pickup truck carrying two young men in Forest Service uniforms. They asked the Forest Service employees if they had seen the smoke and they were told, "Yes. We just set fire to the trailers up there. We put kerosene on them."

The trailers were private property and were located on the Pittsburg patented mining claim, a property owned by Mrs. Edward Shehee of Nogales, Ariz. who also owned a number of unpatented claims in the same area.

The day after this testimony came out at the hearing a representative of the Forest Service went to Nogales and obtained from Mrs. Shehee what the Forest Service called "post permission" to burn the two trailers that they had torched 17 months earlier. It is significant that Mrs. Shehee wanted to continue to hold her

unpatented claims, and the Forest Service was in a position to bring a validity contest against them if she did not agree to give the "post permission" for arson against her property.

I, myself, located a placer claim, the Oro Escondido, on October 13, 1962, in an area that has produced placer gold over a period of 100 years, with the miners employing crude and mainly unmechanized methods. I recovered a substantial amount of gold from the gravels which I mined on the 10-acre claim between 1961 and 1965.

In order to have shelter from the elements and a place to keep my tools, I made bricks of adobe mud and erected a small 12 by 20-foot one-room cabin on the claim. I spent approximately one-third of my time staying and working on the claim (three days each week) in an attempt to develop it into a viable, financially sound mining property, during these years.

The claim was in an extremely remote area. It was about one and one half miles north of the Arizona-Sonora border. The final ten miles of road to it was strictly 4-wheel driving country. I laboriously hauled in supplies and equipment and developed sources of water to process my gold gravels. I employed numerous methods of extracting the gold values from the gravels, developing some methods that are currently being used in many gold producing areas of the world.

On May 2 and 3, 1967, two Forest Service "mineral examiners", Roland Tragitt and Gilbert Mathews, accompanied by a very large ex-professional football player in the employ of the Forest Service and bearing the title of "mineral guard" conducted an "examination" of the claim. They dug some gravel and ran it through a rocker, later panning the concentrates.

In every sample which they took (although they never went to bedrock where the greatest concentration of gold is found) they recovered gold. Still, the Bureau of Land Management contested the claim as (1) having no valid discovery, and (2) being non-mineral in character. The case was held before Hearing Examiner Paul Shepard in Tucson on February 15 and 16, 1968.

I testified that I had recovered gold from the claim and that I believed it had the makings of a profitable mine. Experienced placer miners Tom Anderson, Harry Crowder and Ernest Escapule testified on behalf of the mineral deposit as well, saying that they believed the property had merit and that they would locate and pursue such a claim.

Forest Service employees Tragitt and Mathews testified as to their sampling procedures and the results. They said the

claim was not sufficiently rich in gold to be valid. They also testified that they sampled to bedrock. Hearing Examiner Shepard ruled that the claim was invalid.

I appealed to the Director of the BLM. My appeal was dismissed. I relocated approximately the same ground under the name of Doran's Folly. The Forest Service countered with trespass charges in a civil suit to collect rental and damages. The matter went to an initial hearing in Federal District Court but was then postponed.

I continued in possession of the claim, producing gold from it until 1976 at which time I shut down operations and abandoned the property as part of an agreement with the Forest Service that called for that agency to withdraw their suit for damages against me. I filed a charge of perjury against Forest Service employees Tragitt and Mathews, complaining

that they had lied about sampling to bedrock in the 1967 examination. This charge was investigated by an operative of the Office of the Inspector General of the U.S. Dept. of Agriculture. Although evidence and testimony was presented by an expert witness (Ariz. State Mine Inspector Verne McCutchan) that the mineral examiners did not reach bedrock as they had sworn they did, the OIG report cleared Tragitt and Mathews of the charge.

When I finally abandoned the claim, it was immediately relocated by another miner who continues to hold this valuable property against the day when he feels he can mine and receive the highest price for the gold that it contains.

**Coronado National Forest, Arizona**

Earl Francis located the Triangle Dot unpatented mining claim May 25, 1963, a short distance southeast of Oracle,

Arizona. He recorded the claim in the Pinal County Courthouse June 3, 1963. The quartz vein on which he made his discovery contained values in gold and silver.

Five months after Francis made the location--on October 28, 1963, Forest Supervisor Clyde W. Doran requested that a mineral examination of the claim be made. On December 5, 1963, Assistant Regional Forester Zane G. Smith notified Doran that Forest Service Mineral Examiner Jack Pardee had been assigned to make the examination and a report on his findings. Pardee conducted the examination on October 14, 15, 22 and 23, 1964. D.D. Cutler (for Zane G. Smith) apparently received Pardee's report on Nov. 12, 1964.

On Dec. 21, 1964, Richard L. Fowler, then attorney in charge for the Southwest Region U.S. Forest Service, took over the case. A BLM hearing examiner heard the contest in July of 1965.

Francis, a man of 35, requested permission from the Forest Service to string a power line from a nearby ranch to furnish electricity to power an ore crusher. Refused, he obtained and dragged up the mountain a gasoline-powered generator to help develop and work his mine. He also requested permission to put in a road. This was also refused so the five-foot, five-inch 125-pounder carried timber, cement, water and other construction materials a half mile up the rough mountainside to use in building a crude shelter to keep him out of the sun, snow and rain.

On December 10, 1965, District Ranger John Waters sent Francis a letter to the effect that the BLM's hearing examiner had found the claim to be invalid (on November 29, 1965) and that the government would assume ownership of the improvements in 30 days. Francis had no funds, but determined to appeal the Feds decision, he wrote up a

crude appeal himself. On June 22, 1966 the Director of the Bureau of Land Management dismissed the appeal.

It was on August 15, 1966, that Earl Francis took his dog and cat to a neighbor then left his car, wallet and personal papers nearby and walked back up the mountain to the Triangle Dot mining claim. About 5:15 p.m. on that day residents in the area heard a blast. The following morning Francis' car and personal effects were found. Two neighbors went searching for Francis and discovered an area that appeared to have sustained an explosion. Justice of the Peace Kelly Haddad was called from Kearney, Arizona. After examining the site and the fragmented remains, he ruled that Earl Francis had committed suicide, using between ten and 20 sticks of dynamite to blow himself to bits.

It was four days later that Forest Service Attorney Richard L. Fowler sent a

letter to the assistant regional forester saying, "The subject contestee committed suicide on his mining claim. Our file is closed."

On January 3, 1967, Ranger John Waters reported to Coronado Forest Supervisor Clyde W. Doran: "Wood and trash were burned and metal, junk and debris were buried with bulldozer and the site leveled to original contours as nearly as possible. The road was drained, put to bed and closed. Close the case."

Twelve years after Francis was harassed to death--October 31, 1978, a Texan, Paul Miller, and some associates examined the site of Earl Francis' Triangle Dot claim. Believing the quartz vein carried worthwhile values, they located two claims, the Halloween and the Spook, and set about drilling holes and cutting samples. Four six-foot holes were drilled. Assays on the cuttings were as

follows: #1 Au 0.27, Ag 5.10; #2 Au 0.14, Ag 3.90; #3, Tr & tr; #4, Au 0.03, Ag 0.70; #5, 0.21, Ag 11.60.

Miller and his associates spent a number of months doing development work on their claims. Eventually they sold them. The current owner has been mining them on a small basis--apparently profitably.

**Prescott National Forest, Arizona**

The Happy Home lode mining claim was located in the Groom Creek Mining District, Yavapai County, Arizona on April 9, 1948. The district was noted for its production of gold from both placer and lode mines over a period of nearly 100 years at the time this claim was located.

In 1952, it came into the possession of Miss Emma M. Andres of Prescott. Soon after becoming the owner of the property, Miss Andres agreed to allow Gilbert W. Quick, to stay in a 10 by 14-foot cabin

that was on the property, serving as a caretaker-watchman.

The Forest Service began action in 1960 to remove Quick and the cabin from the mining claim. On June 6, 1962, Roy T. Helmandollar, manager of the Phoenix office of the Bureau of Land Management requested U.S. Forest Service Attorney, Richard L. Fowler to contest the claim on the grounds: (1) there was no valid discovery; (2) the property was non-mineral in character. On July 20, 1962, the claim was declared null and void by the BLM and Miss Andres was notified by the Forest Service to vacate the property and to remove the improvements on Dec. 31, 1962. This she failed to do and Gilbert W. Quick remained in the cabin.

On January 2, 1963, the Forest Service posted the building as property of the United States Government. Early in the morning of January 8, 1963 a neighbor

(getting up in the night to put wood on the fire) noticed a red glow in the direction of the Happy Home cabin. Authorities were immediately notified. Prescott National Forest District Ranger Fritz Menninghaus arrived on the scene. Unable to get very close to the cabin because of the heat of the blaze, he saw what appeared to be a body in the burning structure. About 4 a.m. he contacted the office of the Yavapai County Sheriff with the information that there was a body burned up in the cabin.

Yavapai County Sheriff Al Ayres, accompanied by Dr. Albert Daniels, County Coroner Dan Seaman and Prescott Courier photographer Ivan Murray went to the scene early in the morning.

What Dr. Ritter said he believed were human remains were collected from the burned-out cabin, put into a container and taken to the sheriff's office in Prescott.

On January 18, 1963 Coroner Dan Seaman and a six-man coroner's jury signed Verdict No. 1925, saying, "John Doe, Happy Home Lode Mining Claim, Groom Creek, Ariz., died January 8, 1963 of 'unknown causes'. Autopsy performed by Dr. Albert Daniels."

How and why John Doe (Gilbert W. Quick) died remains unknown. Suicide was ruled out. Quick's .38 caliber Colt was found seven feet from the body. There were no cartridges or cartridge cases in the revolver. The facts point to a thorough destruction of all evidence:

1) Arizona law states that the results of a coroner's investigation must be filed "forthwith," with the Clerk of the District Court. Coroner Seaman did not file the verdict until July 12, 1963--six months later;

2) No death certificate was ever filed for either a John Doe or Gilbert W. Quick;

3) Dr. Albert O. Daniels refused to release a copy of the autopsy report to the inquiring news media (who doubt that an autopsy was ever performed or that a report was ever made);

4) Newspapers--The Prescott Courier included--carefully preserve their file copies of their papers. The Prescott Courier's file copy of January 9, 1963, which contained an article and pictures--one of which showed District Ranger Fritz Menninghaus looking at a portion of the charred cabin where John Doe's (Gilbert W. Quick's) body was found, has disappeared;

5) Newspapers value their negative files, but according to the management of the Prescott Courier, they cannot locate the negatives that their photographer Ivan Murray made--and he says should be in the Courier's negative file--showing the fire scene and the charred body;

6) Dr. Albert Daniels replied to a query, "I am unaware of the final disposal of the remains to which you referred";

7) Lucille Johnson, Clerk of Yavapai County Board of Supervisors wrote, "In answer to your inquiry concerning the burial of the remains of a body believed to be Gilbert W. Quick, but who is identified in county records as John Doe, we have made careful search of our records but cannot find any record that the county paid for the burial of this person"

8) Both the Hampton and the Ruffner mortuaries say they did not handle final disposition of the body--John Doe or Gilbert W. Quick;

9) Wayne Saunders at the Veterans Administration in Phoenix says they did not receive any claims for a burial allowance for Gilbert W. Quick;

10) Yavapai County Sheriff Al Ayres replied to an inquiry of the disposition of

the remains found in the ashes of the cabin with, "No burial arrangements were made."

All of this took place at a period when the Forest Service was actively purging the national forest of unpatented mining claims. They were particularly contesting any claims upon which there was a structure. The events at the Happy Home Amended Lode Mining Claim struck fear into the hearts of other mining claimants in the area and they abandoned their properties. Several of them indicated to a reporter who inquired into the Gilbert W. Quick matter five years later that they believed that the cabin on the Happy Home claim was torched in the night and that Quick died in an arson-caused blaze.

WAYNE WINTERS

STATE OF ARIZONA )
) ss.
County of Maricopa )

Subcribed and sworn to before me by Wayne Winters this 9th day of January, 1985.

Beverly A. Beitler
Notary Public

My Commission Expires: July 14, 1987

## APPENDIX II

## "MINERS GIRD FOR BATTLE WITH FEDS OVER RIGHTS"

WESTERN PROSPECTOR & MINER

Tombstone, Arizona, November, 1984

Representatives of several organizations of miners in California are up in arms about recent atrocities committed by the U.S. Forest Service against miners and holders of mining claims located on National Forests. In recent weeks they have "gone public" with their battle to seek justice for persons whom ethey say are being harassed, wrongfully taken to court, and driven from claims that they are operating under the provisions of the mining laws.

A leader in the effort to seek justice for the miners is Flo Maddox, Anderson, California, national president of the Western Mining Councils, an organization with 30 chapters in seven western states.

Other organizations, including United Mining Councils of America and Mother Lode Miners are also participating in the effort.

Western Mining Council members and directors from eight different councils recently picketed and demonstrated in Redding, California, when a Federal Hearing Examiner (judge) heard an action brought by the Forest Service against miner Dave McMullen in an attempt to invalidate his mining claim.

In September Mac Montenegro, president of Salmon River Miners Association, appeared before the Siskiyou County Board of Supervisors requesting aid from that group in overcoming the harassment that miners are receiving from the Forest Service. He told the supervisors that miners are being forced to leave their claims and if they did not leave within a prescribed time period, the F.S. would

threaten the miners and destroy their property. He added, "They tell us how many hours we must work the claim or it isn't a valid claim."

The supervisors also heard from Dick Ober of the staff of the Klamath National Forest in reply to allegations of destruction by the F.S. of miners' property on their claims. Ober said he didn't think the men who impounded personal property on claims destroyed anything, but admitted that he had not seen photographs made of a camp site where the Forest Service had "impounded" certain properties.

The Board of Supervisors have invited Congressmen Gene Chappie and Norman Shumway to Siskiyou County to meet representatives of the miners and the bureaucracies involved.

A meeting of independent miners was held at Happy Camp, California, November 10 and out of it came a "Declaratory

Statement," which is being sent to members of Congress, Forest Service and BLM officials, mining publications and a number of organizations that are involved with mines and mining. It reads, in part:

DECLARATORY STATEMENT OF

INDEPENDENT MINERS

"We are involved in a class action, illegal harassment by government agents. They are acting in contempt of numerous Federal Court rulings and are repeatedly, with malice and forethought, flounting Federal law.

"Using Gestapo tactics, uniformed and armed agents of the USDA Dept. of Agriculture, U.S. Forest Service, are illegally forcing hundreds of independent miners off their legally held mining claims.

"The Department of the Interior, Board of Land Appeals has ruled: The development

of a mining claim cannot be tortured into federal action, major, minor or otherwise, since by discovery of a valuable mineral deposit within its boundaries, its locator acquires an exclusive possessory interest, a form of property which may not be taken, without due compensation.

"Maybe the Forest Service has never heard of the Dept. of the Interior, Board of Land Appeals or their decisions, and maybe they have never heard of Chapter 30 U.S.C.A. 26, or any other of the other sections governing mining and miners' rights, or of the over 200 Federal Court decisions substantiating these laws. Yet one would have thought they should have heard U.S. Magistrate Larry Nord in Eureka, Calif. on Sept. 9, 1983 when he said to the Forest Service, 'Like it or not, that is the law and if you want to do something about it you will have to change the law through an Act of Congress.'

Magistrate Nord was referring to Chapter 30 USCA 26 and the definition of 'mining operation' as restated in U.S. Dept. of Agriculture, USFS Chapter 36 Rule 252.3.

"The court ruled in favor of the defendants in two cases: 1. USFS vs. Billy Mitchel 1-83-111-M; 2. USFS vs. Hanta-Yo Mining 1-83-112-M. The defendants in these cases were found not guilty of camping beyond the 30-day limit. It was found that a miner can camp on public lands as long as he is actively mining.

"Did the Forest Service stop issuing these citations in accordance with the above rulings? No. Do they still point guns at miners and bulldoze their camps? Just ask Jim Gregg of Happy Camp, Calif. He appeared before the Siskiyou County Board of Supervisors on Sept. 12 to complain harassment and seizure of his personal property, the destruction of his

mining claim, and the arrest of his co-worker Bob Biggs.

Biggs was issued a citation for camping beyond the 14-day limit. He was unable to appear due to lack of transportation. (The appearance before a Federal magistrate would entail a 240-mile round trip to Weed, Calif.) He was later arrested by a S.W.A.T. team of 11 armed men. He was forcibly transported to Weed, Calif. shackled with leg chains and handcuffs. The Federal magistrate disclaimed any jurisdiction and remanded him for trial in Sacramento. He was then released to make his way back home (120 miles) with no money and clad in cut-off shorts and tennis shoes.

"When the Forest Service ascertained that Jim Gregg had a legal dredging permit they decided he was in violation of Chapter 36 regulations requiring a plan of operation. This was in violation of 43 CFR

3809 1-2 (the law) which says: Casual use -- negligible disturbance. No notification to or approval by the authorized officer is required for casual use operations. Submitting a plan of operations, Gregg was told he would have to post a $2500 cash bond before he could work his claim. (This is not required by either of the two actual authorities in the matter -- The Calif. Reclamation Act and the BLM.

"Gregg refused to post the bond. The Forest Service said he was trespassing and ordered him to cease operations and vacate the claim. When he refused to obey this unauthorized order the Forest Service's armed S.W.A.T. entered onto the claim, confiscated Biggs' dredging equipment, the personal belongings of both men (including toilet paper), destroyed the camp, leaving behind a pile of rubble. It was done without a court order. Gregg was billed for the F.S. "cleanup" activities.

According to the "Declaratory Statement," 'Jim Gregg's story is typical, not an exception. Hundreds of independent miners are being harassed right now with terrorist tactics by the Forest Service. The list includes James Settee of Scotts Bar, Calif., Karin Kaplon of Yreka, Calif., Jeff White on the Illinois River, Billy Mitchel on the Siskiyou Fork of the Smith River, Tom Forqueran on Patrick's Creek and Fred Lowe of China Garden. All have one thing in common -- Their rights as Americans to lawfully engage in their chosen profession.

GRIEVANCES

"Although the grievances of the mining industry against the Forest Service are many and varied, they mostly have one common denominator -- This is unauthorized regulation allowing hundreds of Forest Service personnel, in dozens of locations, to make arbitrary decisions that may or may

not be legal but are usually obeyed simply because it is costly and impractical to contest them.

PETITION FOR REDRESS

We, the INDEPENDENT MINERS, now come to protest and submit the following list of grievances for which we seek relief:

1. The immediate cessation by the Forest Service in their regulation of mining claims under USDA 36.

2. Immediate status of 'cureable defect' for cases of failure to comply with the parts of the regulations that exceed the requirements authorized by law. (F.L.P.M.A. 43 USC 1744 '1976' currently).

3. Initiation of a program of restitution for those "curable defects" which wrongly and without authority caused damage of loss of life, property or income.

4. Any future agreements between BLM and the Forest Service for the cooperative management of mining claims on public

lands, shall clearly include the requirement that they be governed by existing mining laws.

5. The formation of a cooperative committee to draft and submit for ratification of "simple and clear cut guidelines of mining laws" in layman's language, which can be fully reproduced and widely distributed. The guidelines must differentiate between casual use operations and mining operations and include the determination of binding requirements and the amounts.

## SUMMATION

"The Mining Law is clear. We have 112 years of laws and decisions to guide us -- going back as far as 1872 and progressing right up to 1984. Numerous court decisions have pointed out the intent and the letter of the law.

"The Forest Service acts without authority and in direct contempt of the

law, often forcing law-abiding citizens from their mining claims on the public lands.

"All semblance of government by law is fading away where the bureacratic Forest Service and its edicts is concerned. This cry for 'law and order' is the plea of those who are drowning in so many unauthorized rules and regulations. Law-abiding citizens can not follow the rules unless they are stated clearly.

"Perhaps one day the prospector in man will die -- and with him the fighter, the wanderer, the explorer, the adventurer, the rover, and doer and the hoper. Then they would become, as many of the bureaucrats desire, like cattle and sheep -- spending placid days while grazing in Federally-controlled pasture. But not yet! Not without a fight!"

Persons close to the mining organizations have expressed their belief

that the Federal agencies charged with administering the public lands -- the Forest Service and the Bureau of Land Management -- are intentionally stepping up their harassment of owners of unpatented mining claims preparatory to the initiating in Congress once more of legislation which if passed into law, would place all mineral on the public lands under a leasing system, thusly nationalizing the mining industry. They point out that if this should happen it would mean the end of the small miner -- leaving only the biggest of firms in a position to compete for mining leases.

# APPENDIX III

## LEGISLATIVE PURPOSE OF PUBLIC LAW 167

## (30 U.S.C.A. 611)

**ABSTRACTS FROM:**

Hearing before the Subcommittee on Minerals, Materials, and Fuels of the Committee on Interior and Insular Affairs (CIIA) United States Senate, Eighty-Ninth Congress, Second Session on S. 2281 and S. 3485, Bills to Amend Section 3 of the Act of July 23, 1955 (69 Stat. 367, 368). June 28, 1966.

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Sub-Committee on Minerals,

Materials and Fuels

MEMBERS

## Statements



## Communications

COMMON VARIETIES ACT AMENDMENTS

Tuesday, June 28, 1966

U.S. Senate

Subcommittee on Minerals,

Materials, and Fuels of the

Committee on Interior and Insular Affairs,

Washington, D.C.

Senator Gruening . . . At the hearings in May 1955, on Senator Anderson's bill S. 1713, it was brought out that the mining laws were being used by persons, who for the most part were not miners, to obtain title to hundreds of thousands of acres of valuable timber belonging to the people of the United States at no cost to themselves, and subject to little or no control by the Forest Service. The infamous Al Sarena case is a glaring example.

Also, mining claims were being used as a means of obtaining rent-free and cost-free tracts of land belonging to the people of the United States to taverns, motels,

and other commercial enterprises which bore no relationship to mining.

It was to correct such situations that the Common Varieties Act was enacted.

The Interior Committee's report on the measure, after setting forth the purposes and needs for the legislation, specifically states:

> At the same time, the measure faithfully safeguards all of the rights and interests of bona fide prospectors and mine operators. In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws. (S. Rept. 554, 84th Cong.)

**STATEMENT OF HON. HOWARD W. CANNON, A U.S. SENATOR FROM THE STATE OF NEVADA**

SENATOR CANNON . . . The purpose of Public Law 167 apparently was to preclude the possibility of unauthorized or fraudulent locations by speculators who had no intention of developing mining operations,

but were interested only in gaining title to surface land.

This is a sound and wise purpose, but the interpretation of the law by the Interior Department has been unrealistic and has resulted in grave problems in that the Interior Department has acknowledged no difference between common and special or uncommon varieties of sand, gravel, building stone, and other building materials.

. . . The Department of Interior has consistantly held in recent years that all sand and gravel and similar deposits are of a common variety - an interpretation that excludes all special varieties of building materials from location under the mining laws. The interpretation also failed to consider or recognize the type of materials needed by the construction industry.

Moreover, Mr. Chairman, the adoption of this position by the Interior

Department, in my opinion, clearly ignores the intent of Congress at the time it passed Public Law 167.

If the purpose of the law would have been to eliminate all varieties, the language of the act would have so stated. The Congress, however, specifically added the word "common" to make it clear that only common varieties would be excluded, leaving special varieties of building materials subject to the mining laws.

The chairman also outlined two other areas of serious difficulty:

1. The lines of cases in which the Solicitor has redefined and modified the "prudent man" test of discovery has led to instability of departmental policy.

2. The seemingly arbitrary and capricious method in which mining claims have been contested and frequently invalidated is an extremely disturbing source of constant discontent in the mining industry.

With regard to the firm conviction of many of us that Congress intended that special varieties of sand, gravel, and similar materials should be subject to location, it should be pointed out that in 1965 the sand, gravel, and crushed stone industries produced 880 million tons valued at $910 million.

These figures should make it obvious that not all sand and gravel deposits are "common" and have no value. Special varieties are valuable resources and are essential to our economy.

I also think it is important to note that the American Society of Planning Officials estimates that some 42 billion tons of special-purpose sand and gravel will have to be produced within the next 30 years to meet construction needs of this country. . .

James Henderson, who will testify today in behalf of the sand and gravel

industry, summed up the industry's problem in a recent issue of "Rock Products," when he said:

> I believe the major problem the sand and gravel industry faces . . . springs from a basic confusion as to what sand and gravel is. To the layman . . . it is just a common substance that exists everywhere. People do not understand that the specifications for any kind of concrete aggregate utilized under engineering requirements are growing continuously more rigid.

It is pointed out in "Rock Products" that supplies of special, high-quality sand and gravel are growing scarce near booming urban areas and that the Government owns a large percentage of the land in the Western States - about 87 percent in the State of Nevada.

. . . many persons - including officials of the Department of the Interior - have expressed an interest in insuring that land on which sand and gravel claims are located and validated should, in fact, be devoted to mining purposes . . .

It is conceivable that a deposit of sand, gravel, or other material might be claimed near an urban area, purchased for a very small price, and then immediately developed for purposes entirely foreign to mining.

I have introduced a bill, S. 2281, which is designed to recognize that the intent of Congress, when it passed Public Law 167, was to allow the locations of special varieties, and at the same time to protect against fraudulent and speculative locations. . .

I was joined in sponsorship of S. 2281 by Senators Bible, Moss, and Simpson. I have not discussed the common-varieties problem with them since the introduction of S. 3485. I know, however, that they would support any effort to resolve a serious problem faced by sand and gravel operators who have been hard hit by the unrealistic administration of Public Law 167 by the Interior Department. . .

I might add, it was rather interesting in our floor debate on the mine safety bill a few days ago, there was an attempt to remove sand and gravel from the implications of the effect of the Mine Safety Act, and the amendment was defeated. So, we now have a situation where the mine safety laws apply to a mine for sand and gravel, and yet the Department, on the other hand, says that you cannot have a mineral location for sand and gravel, and it seems to me that they are trying to carry water on both shoulders. . .

. . . I think that this committee could work out a satisfactory solution there if it were incorporated into your bill, to make it absolutely clear that we are not to trying help anybody here except a legitimate mine operator that wants to mine sand and gravel for use in the construction industry. . .

SENATOR MOSS. I have no questions. Just by way of comment, I think it is a very fine presentation of the problem. I was happy to join Senator Cannon as a co-sponsor of this bill. As you have observed, Mr. Cannon, we well could take in the best parts of both; certainly the thing we ought to do is provide against abuse but at the same time not throw the baby out with the bath water.

We should not eliminate entirely the ability of people to file and utilize the minerals of sand and gravel, the same as they do other hard minerals.

**STATEMENT OF HON. LEE METCALF,**

**A U.S. SENATOR FROM THE STATE OF MONTANA**

SENATOR METCALF. What we have here today is a problem that constantly plagues any legislative body. That problem is the gap that occurs between the adoption and the implementation of a law. No matter how

carefully we select words intended to direct a governmental agency, the action taken by such agency often fails to correspond accurately with the legislative intent.

That is the case with the Common Varieties Act of 1955. The implementation of portions of that act has not, to my mind, followed the intent of Congress. As a result, hardships have been worked on certain legitimate interests and segments of society. S. 3485 should correct the situation by more precisely defining the action we wish carried out under the law.

The Common Varieties Act of 1955 itself was adopted with the idea of correcting abuses of the Federal mining laws, the basic statute of which went on the books in 1872. These laws permit anyone to go out on the public lands of the United States to look for minerals. If the explorer makes a discovery of a valuable

mineral in place, the law permits him to "make a location" on the site of his discovery. The deposit he has discovered thereby becomes his property. He is allowed to develop it without going through the process of obtaining fee simple title, or he may become the owner of the land itself by complying with certain statutory requirements.

The mining law of 1872 and its subsequent additions played a major role in opening the West to the mining industry. But over time, abuses began to occur. As land became more scarce, more unscrupulous persons - persons with no interest in or knowledge of mining - used the law as a vehicle through which to obtain valuable tracts of public lands.

Spurious claims were filed as a subterfuge for the purpose of acquiring free land for summer homes, private hunting perserves, commercial enterprises or for

surface values. Many people were making filings under color of the discovery of sand, stone, gravel, pumice, pumicite or cinders, all of these being minerals within the meaning of the Federal mining laws, and, Mr. Chairman, may I comment on Senator Cannon's statement at this point.

These are abuses that we intended to prevent when we passed the Common Varieties Act. I was a Member of the House of Representatives and participated enthusiastically in the passage of that legislation. The chairman of this subcommittee has mentioned the nortorious Al Sarena case.

I can recall when we built Hungrey Horse Dam, Mr. Chairman. There was only a little bit of land up through that steep and precipitous canyon. If somebody wanted to open up a bar or rooming house, they filed a mining claim and by the time they had it all litigated, the dam was buiit and they were off the property.

Collier's magazine, I remember, had a series of articles on the notorious abuses and it is not the intention of anyone of this committee to return to that sort of a situation, and if Senator Cannon's bill is better than S. 3485 in correcting the abuses, it certainly should be wedded to S. 3485 so that we had before the passage of the Common Varieties Act. . .

Obviously, in acting to stop abuses of the mining laws, Congress desired in no way to impair the rights and activities of bona fide mineral prospectors and mining operators. Senate Report No. 544, which accompanied the Common Varieties Act, stated explicitly:

> In no way would it deprive them (bona fide prospectors and mine operators) of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws.

I do not see how we can be any more explicit than that as to the legislative intent.

Unfortunately, the hope and intent expressed in this regard has been frustrated by the administration of the act. We have, in fact, interfered with the rights and interests of those who wish to make wholly proper use of the mining laws.

The Forest Service and the Bureau of Land Management have imposed standards, requirements, and tests not envisioned by supporters of the 1955 act. For example, in determining whether a mineral has a "distinct and special value," the Forest Service and the BLM have applied a test of the "end use" to be made of the material.

Under this test, if a rare and valuable material such as travertine - a stone resembling fine Italian marble - is to be used to decorate the lobby of a building, it is considered to fall outside

the law's exemption for material with "distinct and special value." The stone clearly possesses such value. But because its proposed use is common, the agencies have judged the stone itself to be a common variety within the meaning of the law.

Moreover, the Interior Department has chosen to apply an uncommon meaning of the word "common." Members of Congress, I believe, used that word in the act to mean types of stone found in abundance in a number of places. But the Interior Department has chosen to consider as "common" minerals which are common within their own category.

For example, neither travertine nor limestone is found in great quantity in a great number of locations. But the Interior Department disregards that fact, and tests a particular deposit of travertine according to whether it is a common type of travertine, or a deposit of

limestone according to whether it is a common type of limestone. Such a test kills what, in effect, are bona fide mining claims held by substantial mine operators for years and in which substantial sums have been invested in good faith.

Complaints about the narrow and excessively restrictive administration of the Common Varieties Act prompted this subcommittee last June to hold hearings on the problem, both in my home State of Montana and in Washington under the chairmanship of the present chairman of the subcommittee. Numerous specific cases were described for the subcommittee showing how the law was producing results never intended by Congress. . .

. . . One paragraph from the statement of Robert E. Matson, geologist with the Montana State Planning Board, reads:

> I believe that the Departments of Interior and Agriculture in their interpretation of "common varieties"

under Public Law 167 have discouraged exploration and development of new nonmetallic mineral deposits by requiring unrealistic lease arrangements and royalty payments. In addition, I believe that the decision of the Departments of Interior and Agriculture to classify any stone used for building purposes as "common variety" is completely arbitrary.

Then if I may read a further paragraph from the statement of Mr. L. H. Larison, who is the president of the American Chemet Corp. American Chemet mines, processes, and sells unusual stones such as arragonite-type onyx, black and gold marble, red granite, green quartzite, and black gabbro:

> The black and gold marble is made into terrazzo chips and can also be sold as polished wall panels. This product is similar to one that is imported from Italy.
>
> The black gabbro is located on public domain. It is mined and processed for use as exposed aggregate for buildings and is used in filtration beds in oil refineries. In this latter use it is superior to any other known mineral, and according to Uuno M. Sahinen, associate director of the Montana Bureau of Mines and Geology, there is no other known deposit in the United States.

So you see, this arbitrary decision on the end use and the prudent man theory has resulted in the fact that very valuable and scarce stone products have been classified as common variety and as there miners of Montana and of other areas have said, has discouraged development, discouraged exploration, and prevented the development of these new nonmetallic industries.

I was impressed when Senator Cannon pointed out that recently in this mine safety bill we said that part of the mine safety program was going to be the inspection of sand and gravel pits and quarries, and yet, on the other hand, we say in the Secretary of Interior's and in the Secretary of Agriculture's interpretation that these sand and gravel pits and quarries are not mines.

So, I think we should be consistant. I supported the inspection in the mine safety bill and I believe that we should

permit these very valuable minerals which are not common at all to be locatable under the mining laws, as is traditional in the West. . .

SENATOR ALLOTT. I want to compliment you on your statement, Senator. I have a letter here I want to refer to in a moment. But I wonder if your statement would not apply equally well to a stone which we find in some places in Colorado called rhyolite.

I do not know whether you are acquainted with it or not. We will get the Department of Interior up here and get them to identify it. It is a very beautiful building stone, but it seems to me that is should come within the concept of this bill also. . .

SENATOR ALLOTT. . . in this letter Mr. Joseph Cowan, of Canon City, Colo., refers to the quarrying of marble and travertine both and the new interpretation of the law

which heretofore they had had under the minerals, and I think we intended it to when we passed the Common Varieties Act in 1955.

SENATOR METCALF. Not only did we intend to, but we admonished both the Secretaries of Agriculture and Interior that we intended to carry out the traditional intent of the mining law. (emphisis supplied)

SENATOR ALLOTT. . . Mr. Cowan's letter, . . . says:

> "Now we are anticipating of opening a new quarry in Garden Park District on Rocky Ridge. It is open land . . . so we went to take it up as you used to do, found out the new land law has changed it so we cannot operate marble quarry under new regulations.
>
> It takes at least five years for a small operation like ours to get into operation. New law say we have to pay $1,000 for two-year lease and so much a ton, and after we open it up at end of two years somebody could bid a few cents more and take it away from us, and besides we have a man out of Bureau of Land Management over us, no soap."

This letter clearly illustrates how widespread this problem has become.

I also had occasion to get into the travertine situation in another instance and found that they had decided that travertine was not subject to location anymore.

We have to straighten this situation out. Somehow, somebody seems to have gotten the idea that if anybody prospects and locates minerals on the public domain or ore or rock deposits, it is a steal from the Government. If this were true, I think you would agree with this statement: We would never had had any mining development in the West. Would we have?

SENATOR METCALF. No, I think that the greatest single factor in the development of the West was the mining law of 1872 when people were permitted to come out and locate upon the public domain, explore and try to develop minerals. Montana and

Colorado and Idaho - those great mines in the Cordilleras and mines in Butte - would never have been developed or discovered under the present philosophy of our Interior Department. . .

SENATOR ALLOTT. . . So I get a little concerned when some of our people who are unacquainted with the facts become obsessed with the idea that any location of mineral rights or anything of that sort is a robbing of the public. If the West is going to continue to develop, we are going to have to continue to be forward looking in our laws.

The same thing is true in Wyoming, Idaho, and Colorado. There are far, far more minerals underground that can be used for the development of this country than have ever been taken out so far.

**STATEMENT OF ROBERT E. MATSON, GEOLOGIST, MONTANA STATE PLANNING BOARD**

I believe that the Department of Interior and Agriculture in their interpretation of "common varieties" under Public Law 167 have discouraged exploration and development of new non-metallic mineral deposits by requiring unrealistic lease arrangements and royalty payments. In addition, I believe that the decision of the Department of Interior and Agriculture to classify any stone used for building purposes as "common variety" is completely arbitrary

**STATEMENT OF L. H. LARISON, PRESIDENT OF AMERICAN CHEMET CORP. OF HELENA, MONTANA**

It is a definite hardship on the small mine operator and prospector to continually have his right to mining claims questioned and be ordered to hearings with expert witnesses at considerable expense.

The mining industry in Montana and many other Western States has depended a great deal on mining in the past. Mining activity in the past few years has declined. The present method of administering Public Law 167 is discouraging to the miner and determintal to the mining industry.

**LETTER FROM PAUL GEMMILL**

**NEVADA MINING ASSOCIATION**

**Reno, Nevada, June 23, 1966**

Hon. Ernest Gruening

Dear Senator Gruening: . . .

Both large and small operators are severely hampered by inability to determine the validity of their claims without testing through expensive litigation. Production from claims not determined to be valid leaves the operator open to heavy liability.

**STATEMENT OF HON. ALAN BIBLE,**

**U.S. SENATOR FROM THE STATE OF NEVADA**

The interpretation of the Department of the Interior of the Common Varieties Act which does not distinguish between common and special varieties of building materials has caused frustration and hardship to many legitimate mining interests. It has been a troublesome problem in my State and in other areas and, in my opinion, needs correcting. . .

As a member of the Public Land Law Review Commission, I know this is one of the important areas in which further study will be given; nevertheless, it is a problem for the Congress and I am hopeful language can be developed by this Committee which will permit orderly development of legitimate materials, with proper safeguards, for those who are ready and willing to make investments.

It is true that some unscrupulous practices of the past, such as spurious mining claims, have caused unauthorized uses of public lands. I do not favor such uses and I am sure that none of the members of this committee favors such practices. Irrespective, legitimate mining activities of sand and gravel and other common material should not be sacrificed.

**STATEMENT OF ARTHUR W. GREELEY, ASSOCIATE CHIEF FOREST SERVICE, DEPARTMENT OF AGRICULTURE ACCOMPANIED BY REYNOLDS G. FLORANCE, DIRECTOR, DIVISION OF LEGISLATIVE REPORTING AND LIAISON**

MR. GREELEY. . . The remaining provisions of subsection 1 (b) of S. 2281 would effect major substantive changes in the procedures and administration of location and patent of mining

claims. The question, therefore, arises whether these major changes should be enacted before completion of the study by the Public Land Law Review Commission.

SENATOR GRUENING. Well, that would postpone action for some indefinite period, would it not? The Commission is supposed to report by 1967?

MR. GREELEY. . . There would be gray areas out on the edge of the statutory definitions and it seems to us that it is a better approach, both from the standpoint of definiteness and for the standpoint of the flexibiity to use the leasing approach rather than definition through an amendment of the statute as to what constitutes common varieties.

That is just a summary of the Department of Agriculture approach here Senator.

SENATOR GRUENING. I think, speaking for myself, I would prefer to wait until we have the report, but maybe some to the other members of the committee would like to comment.

Senator Metcalf?

SENATOR METCALF. I find this a very inconsistant statement. You say that you should await the Public Land Law Review Commission report for some of these decisions and yet you come in with a startling change in our whole concept of locatable property. You want to make it all leasehold.

It would seem to me that consistently carrying out your statement to its ultimate conclusion, you would eliminate the 1872 law and say that every mining claim had to be leased. Would you go that far?

MR. GREELEY. No, sir; that is not what we have said here, Senator.

SENATOR METCALF. You say if you could do this - I wonder how many "could's" you use there. You "could" do this, "could" do this, "could" do this, and if you did that you would have a completely different approach.

It would seem to me that the simple way to accomplish our purpose would be to tell you what Congress meant when it passed the common varieties law. As one Member of the Congress who participated in passing that law and enthusiastically supported it, I had no idea that the Bureau of Land Management and the Forest Service would give arbitrary and unfair interpretation to what we said about common varieties. It seems to me the simple thing for us to do is to say to the Forest Service, and the Bureau of Land Management, when we refer to common varieties we mean this and this and this, and we want you to carry out the purposes of the law.

Is that not a simple approach?

MR. GREELEY. It is a very direct approach.

SENATOR METCALF. Is that not the approach that would be the easiest and the quickest to achieve what the legislative intent was?

MR. GREELEY. Well, Senator, our concern has been that, particularly with reference to sand, stone and gravel, which are very frequent occurences -

. . . Taking travertine for example -

SENATOR METCALF. Yes; well, should travertine be leasable?

MR. GREELEY. Well, is that objectionable?

SENATOR METCALF. Yes, I think it should be locatable. And I think that that is what we conceived in the Mining Act of 1872.

MR. GREELEY. I can see that for building materials similar to travertine and that type of material which is suitable for use in interior finish, takes a high polish, has an attractive coloring and figure, and so on. I seems to me, speaking personally here, now, that that is not a common variety of anything. And I can see the Land Management problems that are involved there with quarrying this sort of building material being handled without great difficulty under the mining location arrangement. I have to acknowledge that I do not know enough about other substances here in this section, Senator Metcalf, to make a comment about them.

SENATOR METCALF. <u>You want all this material leased and not located under the mining law?</u> (emphisis supplied)

MR. GREELEY. That is my report. That is correct, sir. . . . (emphisis supplied)

SENATOR JORDAN. I have no questions. I think he has made his position abundantly clear, that he wants no location of any of these varieties whatsoever. . .

SENATOR ALLOTT. In the Cowan case which I have here Mr. Cowan - whom I do not know personally, but is obviously a man who has been engaged in this business of quarrying for some 40 years, he and his brother - point out after the decision by the Bureau of Land Management that it would take at least -

> It takes at least five years for a small operation like theirs to get into operation.

That is what he says in his letter. In other words, here you have what you admit, from your viewpoint of marble and travertine, should not come within the

common-varieties classification. We have a decision here where these people have to lease, not locate, and can you imagine that we are going to get much development if a man has to spend 5 years - even conceding this is a small operation - developing a piece of land on a lease basis, only to be deprived of it after the development work is done? After 2 years of operation he could be deprived of it by somebody on a competitive lease for a few cents more.

Now, you have a very, very simple economic problem here: What do you do with things like this?

MR. GREELEY. The answer I would prefer to see is an arrangement by which the man who does the development has an opportunity to be able to get a lease without having to go for a competitive bid.

We agree, Senator, that that is a statement that describes a phase of the problem, the thing that is being administered now as the state of the law.

SENATOR ALLOTT. Well, the decision of the Bureau of Land Management says that it can be disposed of. They say, and I quote from a memorandum to the State director in Colorado, on page 3:

> As our letter to the Cowan's indicates, there is no question in our mind that this marble is "common variety" -

Common variety in quotes -

> by legal definition and that it can be disposed of only under the Materials Sales Act of 1947. We think the Cowan's should be encouraged to purchase the marble under a materials sale contract. We have, accordingly, suggested a course of action for them which we think will be best for them and still be within the requirements of law.

They therefore suggested, and I quote again from the memorandum:

> So far as it is consistent with the arrangement projects, we would recommend the following in the event that the Cowan's elect to make a sales application:
>
> (1) That a sale for this material include at least the 40 acres described above:
>
> (2) That a sale in the $100 to $1,000 range be made at $0.50 per

ton, with the understanding that the Bureau of Land Management may reappraise the material in the event of future or larger sales;

(3) That the term of the sale be for as long a time up to the two-year maximum for sales in the $100 to $1,000 range as the applicants may desire.

Now, if you can apply your theory to the marble-travertine area, then it seems to me you can as logically apply it to other areas as, for example, you have in the case of vermiculite, in which you have refused locatable locations - you and the Bureau of Land Management.

If I may say so, I do not mean this unkindly in any respect. I do not think your suggestion provides a clear-cut access to the solution of this problem, such as might be gotten out of, as the chairman suggested, a combining of these two bills and the desirable features of each, so that Congress does lay down a clear guideline as to what are common varieties and what are not.

There will always be some things in the never-never land, the gray area, of course, and I do not suppose that we can even solve this completely. But we did not have in mind the extension of this and the prudent-man rule and other funny things that have come out of the Department of Interior when we passed our various mining laws. . .

Senator ALLOTT. I should make this clear . . . I am sure Mr. Puckett's decision in this matter was not made as an arbitrary matter by him, but was made in the Bureau of Land Management for him.

Mr. GREELEY. I need to make the same comment with reference to my statement to Senator Metcalf that I agreed with him about travertine, that it seemed to me that it does have special qualities. I am not the one who is vested with the authority to make that decision. This is just an observation before this committee, sir.

The decision is, properly, vested under the law in the Department of Interior and the Department of Interior people are the ones who have that responsibility and who do make the decision, and we are guided by their decisions.

Mr. FLORANCE. Mr. Chairman, may I comment just a moment on the problem that Senator Allott described here?

The suggestion that the Department of Agriculture has made actually would avoid the problem of having to meet the competition as described here. Our suggestion would let a person who goes out and with his own endeavor finds one of these deposits, creates a market for it, have a prior right for a lease. He would not have to meet the competition from the outside person.

Senator ALLOTT. But let me point out that your suggestion has one very great defect, and that is after he had done all

this and invested all the money and paid the leasehold for the first 2 years, even though he may have a prior right, the basic termination of the lease money that must be paid lies in the Department of Interior, from which he has no appeal except to give up his lease and let somebody take advantage of his work.

Mr. FLORANCE. Well, we would assume, of course, that the 2 year period also would not be a limitation, that a lease under the proposal we have suggested could be made for a long period of time and, of course, it is contemplated that the payment that would be made would be the value of the material in place, allowing the lessee to obtain the full benefit of his own improvement and processing of the material.

Senator ALLOTT. If I may suggest it, and again without being reflective upon any of the particular personnel here, what seems to be forgotten in our big

bureaucratic Government is that these people for the most part are people of extremely small means, who are just trying to get ahead under what we have always considered to be the American way of life: That a man who wants to go out and work like a dog and has imagination can make his own way.

Therefore, the minute you put such a man in a position where he has to cope with decision, either of the Department of Agriculture of BLM or Interior, whoever it may be, that he is lost. He does not have the finances to do it and, therefore, it is the equivalent of just shutting him off at that point. This is a classic example of the type of people who are doing this work.

They are small people, small operators, with small financial means, just trying to make a living for themselves and, of course, I suppose also sometimes trying to look forward to the future and even build a fortune for themselves.

But this is still permissible, I think, outside of Wall Street. I hope so. And I just want to bring this to your attention, because the minute you put these people in a position where they have to cope with sending a lawyer down here to fight with the BLM or the Department of Interior, you just effectively chop this fellow's head off and he is through.

**STATEMENT OF JOHN B. LONERGAN, ATTORNEY FOR VARIOUS MINERAL INTERESTS**

In the course of my practice of law, since the so-called common varieties act, section 3 of Public Law 167, was enacted, I have observed some unfortunate and disastrous experiences of bona fide prospectors and miners. It is so hard to sit in an office or to visit your clients in the field and to observe their frustration, their disappointment, their inability to proceed without danger of

incurring extreme potential financial liability, because of the uncertainties arising out of the administrative misinterpretations and expansions of a statute which, if we look at the Congressional legislative history, was very clear in its intent.

The need for clarification is pretty obvious. The protest which has come from the industry began way back soon after the 1955 act became law. The matter has snowballed. It takes years for an administrative proceeding to develop through the respective processes into a final decision by the Secretary or into a case which can be considered by the courts. It is absolutly no answer to say that a miner or a prospector or a big mining company has a way to obtain relief through the administrative process. It is not equitable, it is not fair, and it is not true. - - - -

Second, it takes time. In a competitive world of today, you cannot stand by while a deposit is lying there and you go through the several processes of, in my experience, 3 to 6 to 7 to 8 to 9 years of obtaining administrative and legal court relief leaving either the property undeveloped while you competition goes on, or risking untold liability by operating the property in the face of uncertainty of title.

I think it is true that when anyone operates a material deposit charged as being a common variety on the theory that the deposit is not a common variety, if that individual is wrong, the potential financial liability is horrible, because the statute never runs against the Government. There is no telling what the measure of damages will be, although you can be sure that one measure of the damages will be the extremely expensive defense of

a lawsuit brought by the Government lawyers. - -

I suggest that the latter relief, if there is any - I hope there will be - will come many years from now. The industry cannot wait. I think one other thing that should be called to your attention and is in the forefront of my mind at the moment is this: People talk as though section 3 provided a statement or an indication of what could be located as a mining claim and what could not be located as a mining claim in the field of these common materials. This is not true. Section 3 states that common varieties of the named materials were removed from the category of those locatable. I do not say anything about the continuing legal requirement that is absolutely present in all of these occasions that those deposits to be located must also be valuable mineral deposits within the meaning of the mining law.

This is known to the Department and the Forest Service and to the industry, including all prospectors or miners.

There is another suggestion.. . . The element of good faith is also an absolute requirement in the location of a mining claim. This, too, along with value, is required, and consequently, one who locates a deposit of sand, stone, gravel, pumice, pumicite, (or cinders, etc.) if he hopes that it is an uncommon variety, must still have been acting in good faith and must be able to show that it was a valuable mineral deposit within the meaning of the mining law. . .

I might say, and I do this not facetiously at all, that it would be helpful if the people who decide for Government agencies were to take a turn, perhaps a sabbatical leave, in the field working for a prospector, a miner, or a mining company, to realize the practical

problems in the day-to-day operaton before they suggest changes in the mining law or in its construction. I do this respectfully. I think it would be very helpful. I know it is impossible, but I think that it does help to know that there are practical problems.

The statement of Mr. Greeley for the Forest Service - I do not know Mr. Greeley - but it impresses me as being a bid for the maintenance of the status quo, at least, and an ultimate change to the leasing process.

Gentlemen, the leasing process is no relief to a prospector or miner who wishes to go out and develop a body of material which he finds. It takes money, it takes time, it takes extensive development on building stone just as well as anything else, in most cases for real commercial operation, and this cannot be done safely or satisfactorily under a leasing system.

You cannot finance large plants or mining deposits, mineral deposit developments, on uncertainties, and consequently, what is needed is certainty; it is certainty in tenure; it is certainty that is provided by the basic 1872 mining law as clarified by such a statute as is proposed by the bill S. 3485. . .

. . . As I understand the bill and your statement in offering it, Senator, it was intended to clarify and to express the intent of the Congress as it existed in 1955.

SENATOR METCALF. That is right.

MR. LONERGAN. And which has been misinterpreted.

SENATOR METCALF. Distorted.

MR. LONERGAN. Distorted, to use your word, and overextended and as I have suggested rather dangerously to the entire mining industry by the interpretations and actions of the Department.

SENATOR ALLOTT. You mentioned the situation with respect to the copper deposits. A lot of people who go out and prospect are not necessarily mining engineers even in this day and age.

Whate could occur, and would you comment on the question you raised, whether you intended to raise it directly or not, with respect to a person who filed a location on what is without question a valuable mineral. Then it develops that as a result of circumstances or highways or any one of a dozen things that might happen, the chief value of the location is not because of the original filing but because of the common varieties of sand, stone, pumice, or something like that which was also found on this particular area? What would be the situation in this instance? Suppose the patent had not been issued at the time this became obvious and the man had taken out 50 times as much

dollar value of gravel or some other common variety as he had taken out of the locatable mineral? Where would we find ourselves in such a situation and does it need attention in this bill? . . .

MR. LONERGAN. . . I think that it would be certain under the present administration rulings and practices that the Bureau of Land Management, the Department , and, if the Forest Service were involved, the Forest Service, would take the view that the claim was not valid.

SENATOR ALLOTT. . . But you still believe that this leaves an area of much confusion?

MR. LONERGAN. Yes, sir, I do. The example, I believe given - it is either in the Senate or House report on the 1955 bill - was the finding of gold in the sand and gravel of the bed of a stream. That is a typical example.

If the Bureau of Land Management takes the view that the sand and gravel - all sand and gravel is common variety and therefore not locatable - unless the locatable mineral provided a valid discovery under the mining law with respect to the other minerals contained in it, there would be no help to the owner from all of those facts.

In my view, the fact that there was useful and valuable sand and gravel on the claim plus useful and valuable other mineral, and the other mineral was not sufficient of itself to support the claim as a valid mining claim, under the current rulings of the Bureau then the entire claim would fall.

**(WRITTEN) STATEMENT**

**OF JOHN B. LONERGAN . . .**

The full Committee made this plain when it reported out the bill which became

the 1955 Act. Senate Report No. 554, (84th Cong., 1st sess., p. 2) states:

> "At the same time, the measure faithfully safe-guards all of the rights and interests of bona fide prospectors and mine operators. In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws."

In discussing the background of the measure, Senate Report No. 554 (p. 3) noted that "our mining industry is under the constant necessity of exploring for the developing additional sources of new and old minerals to meet the ever-increasing requirements of our national security and industrial economy."

The executive department reports in support of the 1955 measure, included in Senate Report No. 554. clearly disclosed the belief that the provisions would strike at the reported abuses of the mining laws, without interfering with the activities of bona fide prospectors and miners.

Interiors report noted that the national interest in encouraging the discovery of minerals dictated that the mining industry should have a continuing opportunity to locate claims, to mine minerals on those claims, to discover and develop commercial deposits and, if fortunate, to make a profit. This report of the Department, in noting the abuses at which the measure was designed to strike, pointed out that many claims had been on deposits of sand, stone, gravel, etc., which, although technically of sufficient value to justify a location, were actually of minor worth compared to other natural resources of the land.

The Under Secretary of Agriculture similarly reported, saying in part that the Department of Agriculture desired to encourage legitimate prospecting and effective utilization and development of the mineral resources of the national

forests, and stated (S. Rept. No. 554, p. 17): "We would not favor legislation which would interfere with such development of minerals nor work hardship on the bona fide prospector or miner." He further stated in his report (S. Rept. No. 554, p. 18) that the measure "will correct deficiencies in the mining laws and prevent many of the abuses by other than bona fide minerals, but it will not obstruct or interfere with bona fide mineral prospecting, mining and development."

During the debate on the bill, Senator Anderson stated (Vol. 101, Part 7, p. 9334, Cong. Rec. June 28, 1955) that effort had been made to draft a bill that would meet a situation that was rapidly developing into a national emergency and yet at the same time not interfere with the existing rights of bona fide mining activities, either then or in the future. In explaining the bill he said that, among other things, the bill

would provide"that deposits of common varieties of sand, building stone, gravel, pumice, pumicite, and cinders on the public lands, where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 rather than under the mining law of 1872."

But this is not how things have worked out. As a practical matter, Interior and the Forest Service have administered the common varieties law almost as a prohibition against mining claims on the materials listed in Section 3. This is accomplished by imposing standards and tests which violate the intent and purpose of Section 3.

Senator Metcalf made an outstanding exposition of the manner in which the statute is frustrated by the unwarranted and arbitrary standards and tests applied by the administrative agencies. (Vol. 112, Cong. Rec. 12109-9, June 9, 1966.) I

subscribe fully to the Senator's views and respectfully request that his statement be made a part of the record. In line with his expressions let me cite stone as an example.

The correct test should be whether a particular deposit of stone is common stone. But as pointed out by Senator Metcalf this is not the test Interior applies. An individual files a claim on a deposit of travertine. Travertine is a beautiful marble-like stone. It is more expensive than many marbles. Clearly travertine is not a common stone. Neither is limestone a common stone. If Interior applied the test intended by Congress, it would ask, is travertine or limestone a common stone? The answer is apparent. But Interior does not apply the obvious test intended by Congress. Interior asks, is this a common variety of travertine? Is this a common variety of limestone? On

that basis Interior rejects the claims saying "Yes, these are common varieties of travertine, or limestone", as the case may be.

In the same fashion Interior administratively negates the exception in Section 3 which permits the location of deposits of the listed materials if such materials "are valuable because the deposit has some property giving it distinct and special value." House Report No. 730, 84th Congress, 1st sess. (1955), on the bill which became the 1955 Act. specifically refers to the language of this exception as excluding "materials such as limestone, gypsum, etc., commercially valuable because of 'distinct and special' properties". Nevertheless, Interior rules that "distinct and special value" does not mean value over and above that found in common stone, but rather means value over and above that found in stone of the particular

category. Again, using limestone as an example, Interior's view is that whether a particular deposit of limestone has "distinct and special value" depends on whether it has value over and above that found in limestone generally. In this connection Interior limits itself to intrinsic factors such as physical characteristics and chemical compositon and excludes extrinsic factors such as location, accessibility, market and demand, all related to commercial value.

**STATEMENT OF JOHN B. AHERN, VICE PRESIDENT OF MONTANA TRAVERTINE QUARRIES, GARDINER, MONT.**

It is indeed unfortunate that the definition of "common varieties" has been the cause of much hardship within the mining industry. Many small producers have been coerced into relinquishing their rights under the mining laws and have been

forced to accept leases under the Material Disposal Law, which have, in effect, so restricted operations that they are practically out of business. These persons entered into leases because it was felt that, "You cannot fight the Government".

In addition to the problems presented by the interpretaton of Public Law 167 and the definition of "common varieties", there are other problems that face the small mine operator in a dispute with a government agency, not the least of which, is money.

As stated above, many small operators have been forced to accept a leasing arrangement to lease the property in question under the Materials Disposal Law. The payments to be made under these leases are generally excessively high, and so restrictive as to the volume that may be produced under the lease, that the operator is unable to be competitive and thus must eventually get out of the building stone

business. In our case the suggestion was made that our royalty payment should be 5% of gross sales. In addition when we had paid the government $1,000.00 in royalties during any one year we would be required to make a competitive bid on the property in order to retain the lease. This would mean that we would be restricted to a production of 750 tons of stone per year. Under this proposal we could never hope to recover our development costs which to date exceed $20,000.00 on Happy Jack No.3.

I have discussed this problem with several stone producers and I have not found any two leases that are identical. Apparently leases are made on a basis of whatever the traffic will bear.

At no time did we consider a lease. We insist that we have a valid placer mining claim and that the Forest Service is in error in its interpretation of the common variety clause of Public Law 167.

When a dispute arises and a contest is started, through the process known as administrative procedure, the financial burden placed upon the miner is unbearable. In our case our lawyers estimated legal fees would be approximately $11,000.00. In addition there would be travel expenses and expert witness fees. Frankly, gentlemen, the prospect of such unreasonable expenses had a strong influence on our decision to seek the aid of Congress to secure corrective legislation.

Referring to the hearing held in Washington on September 24, 1965, page 128, (Mr. Frank J. Barry described the administrative procedure as a "quasi-judicial proceeding". He cast the Forest Service in the role of an advocate with an attitude of hostility who would carry a case through a series of appeals to the Secretary of Interior. As Mr. Barry

stated, the Forest Service would take the case to court, "and the court is the Department of Interior". No small mine operator can afford to expend the sums of money required in such a so-called judicial process. As a matter of fact mining companies with large financial resources have the same problem as reported by Mr. E. B. Connors, representing Kaiser Cement & Gypsum Corporation at the hearings held in Butte on June 8, 1965, when he stated, on page 83, "we have spent 9 years and over a half million dollars on a project that has not yet gotten of the ground, due entirely to the manner in which our mining laws are being administered".

About two years ago Secretary Udall wrote to Congressman Olsen of Montana, and among other things, made the statement that in lieu of the relatively small cost of a hearing, the Montana Travertine Case should go to a hearing. I ask this question.

These small costs are relative to what? My assets, or the budget of the Department of Interior? Believe me, there is a real difference.

**STATEMENT OF J. R. HENDERSON, PRESIDENT, LAS VEGAS BUILDING MATERIALS, INC., LAS VEGAS, NEV.; ACCOMPANIED BY VINCENT B. AHERN, JR., ASSISTANT MANAGING DIRECTOR OF THE NATIONAL SAND & GRAVEL ASSOCIATION**

In an address at the 50th annual convention of the association, the Hon. John A. Carver, Jr., Under Secretary of the Interior, stated that the growth of the sand and gravel industry since World War II from 200 million short tons of annual production with a value of about $120 million, to 870 million tons and nearly $900 million, respectively, in 1965, has been, in his words, truly phenomenal. He said that when this record is matched

against the trend of the gross national product, it is clear that the sand and gravel industry has been a major contributor to the Nation's developing prosperity, "for you have outperformed the general economy by something like a third."

At the present rate of sand and gravel production in the United States, and assuming that production does not increase in response to growing demand, our industry will have to produce well over 25 billion tons of sand and gravel in the 30-year period from 1962 to 1992. I use this span of years because the American Society of Planning Officials estimates that in these 30 years, increased demand will mean that we shall actually have to produce 42 billion tons in order to provide the basic facilities for the expected propulation growth by 1992. By the year 2000, it is expected that our country's population will total 350 million persons. Great construc-

tion programs of all classifications will have to be undertaken and carried out.

When it formulated its program for natural resources development, the Fairfax County, Va., Planning Commission warned:

> . . . gravel is a natural resource. Although it is commonly found and erroneously regarded as not valuable, it is an important and essential element to our economy and to our every day existence. Gravel is an unrenewable resource that should be used, and should not be lost forever by development on the surface of gravel deposits.

Sand and gravel: Whereas the demands of industry and of the public for high-grade construction aggregates are increasing by leaps and bounds in order to meet the expanded highway and other construction programs so necessary to our economic growth and well-being: Now, therefore, be it

Resolved, That the Western Governors' Conference urges that Congress amend existing law to permit the application of the general mining laws to deposits of sand and gravel which can be mined, processed, and marketed for use of high-grade construction aggregates.

The sand and gravel industry, then, faces some real problems in the future in

obtaining necessary reserve deposits. These problems have been compounded since 1955 by the interpretation of Public Law 167. Public Law 167 sought to exclude, among other minerals, "common varieties" of sand and gravel. The Bureau of Land Management of the Department of the Interior undertook to define the term "common varieties" to include all sand and gravel.

Since that time, the Bureau of Land Management has continually denied sand and gravel claims, and taken the position that they had no choice under the statute but to exclude sand and gravel even though this created a problem of desperate importance in the very States where so much of the land is under Federal ownership. Public Law 167 was intended to prevent the exploitation of public lands by unscrupulous speculators. The National Sand and Gravel Association shares the

Bureau's desire to make it impossible for anyone to exploit the public lands.

The exclusion of sand and gravel from patentability of lands in the Federal domain has created a serious economic problem in the Western States. As of 1964, the Federal Government owned 86.9 percent of the land in Nevada, and in Clark County, Nev., 98.94 percent of the land. While this is by far the largest ownership of Federal land in any Western State, other Western States are also finding themselves in serious difficulty in respect to the availability of sand and gravel of suitable quality for use in their construction programs.

For example, Federal ownership of land in Utah is 69.1 percent; in Idaho, 64.8 percent; in Oregon, 51.1 percent; in Wyoming 48.4 percent; in California, 44.9 percent; in Arizona, 44.7 percent; in Colorado, 36 percent; in New Mexico, 34.9

percent, and in Montana and Washington, over 29 percent.

MR HENDERSON. The country must be aware of the fact that if sand and gravel is to be made available to the public, responsible producers must have access to lands in the public domain in the Western States. Sand and gravel must today not only meet rigid specification requirements, but also must be available at reasonable cost, which means that sand and gravel must be mined reasonably close to the construction market, since transportation is the most important cost element in sand and gravel prices.

**STATEMENT OF DR. DONALD K. SHIELDS, BREA, CALIFORNIA**

It does not seem to me, however, that common varieties is the most basic issue here. The usage of land acquired under mining locations law appears to me to be the basic issue.

And I would simply sum up what I would feel the solution to this would be: To have broad and liberal definitions of locatable minerals, be they common mineral or common material, the common varieties I believe we referred to them as. This would include all of the minerals used in industry, construction, and including decorative purposes, including all other previously mentioned usages, too. And to insure the proper usage of mining land, I would suggest that effective measures to insure the devotion of lands acquired by mining claim or patent under mining location laws be enacted to insure their devotion to mineral production.

**STATEMENT OF WILLIAM KESSLER,**

**ARIZONA GYPSUM CORP.**

It seems to me to be unnecessary to have additional legislation in order to solve the common-varieties problems with

respect to gypsum, but if that is what it takes, if we need to do more than just spell it out, if we need to draw pictures than I heartily endorse Senate bill 3485, which I believe does this. We have also been given much written support of our position that gypsum is not a common variety of mineral.

It has been spoken of many times in the Congressional reports that accompany Public Law 167. There have been many pamphlets, regulations and publications published by the Department of the Interior and almost without exception, they have clearly stated that gypsum is a locatable mineral, and, in fact, I have a letter which is dated June 26, 1964, and it was addressed to Mr. Edward Cliff, Chief of the Forest Service, Department of Agriculture, in Washington, and it is signed by Mr. Charles Stoddard, Director of the Bureau of Land Management, and I will quote two paragraphs as an excerpt from that letter.

Mr. Snell, being the witness who just appeared before you, was a representative of the Gypsum Association. We are not a member of the association, but the reference in this letter is to Mr. Snell of the Gypsum Association:

> Mr. Snell was advised that it was the position of the Department of the Interior and of this Bureau that gypsum was a locatable mineral and that a common varieties charge in a complaint is tantamount to a charge by the United States that the material claimed is not gypsum or is not primarily valuable for its incidental gypsum content. However, the patent application--
>
> Referring to Arizona Gypsum's patent application--
>
> the engineer's field report and the contestee's answer all describe gypsum deposits as the basis for the claims.

Now, upon receiving a copy of this letter, I was highly elated and I thought finally after 4 years that we had the problem solved and that the Forest Service would capitulate so to speak.

However, such was not the case. I would not imagine then how any further stumbling blocks could be thrown in our path or how one could then say gypsum was not gypsum; but I now read a memorandum dated December 15, 1965, which says just that, and I will quote it. This is a memorandum from Mr. Smith, Assistant Regional Forestor to Mr. Richard L. Fowler, attorney in charge. Mr. Fowler is attorney for the U.S. Department of Agriculture at Albuquerque. I will read two paragraphs as an excerpt from the memorandum:

> In our opinion, the claims are chiefly valuable for the gypsum which occurs for the most part as salenite crystals in siltstone and clay stone, therefore, we cannot say that the material claimed is not a gypsum or that the claims are not primarily valuable for the gypsum contained therein.

I will come to his conclusion after he has said it is gypsum:

> The gypsum occurring on the subject claims must be concentrated, this concentrate is now being used for only one purpose, namely as a

retarder in portland cement. This does not require a highly pure gypsum and the product contains impurities of clay stone and siltstone. Accordingly, the product produced is not gypsum in the true sense of the word, but it is principally valuable for the gypsum contained therein.

MR. KESSLER. I might complete this comment by saying that the attorney at Albuquerque received this memorandum and also the letter from the Department of the Interior, and for some unknown reason he was unable to decide then that gypsum was gypsum and grant us our patent on this property.

I think perhaps the reason he did so was because we were advised by the local mining engineer who investigated our property for the Forest Service and also by his chief at Albuquerque that the claims had originally been recommended for patent.

We were then advised that we were to be used as a guinea pig, as a test case, to determine whether or not the gypsum could

be construed as a common variety, and for that reason I was glad to hear the Senator from Colorado's comments about who pays the attorney's bills for appearances before the Bureau of Land Management.

MR. KESSLER. Mr. Tragett. I also was advised that it was originally recommended by Mr. Tragett. However, that was not to me personally. It was to our geologist. But I would like to just close by saying that, while we feel the law clearly has specified that gypsum is a locatable mineral, while we feel the regulations have been clear in that respect, if it must be left to the discretion of an ill-advised or perhaps an ill-informed or an innocently wrong attorney at Albuquerque, that if he is given such discretion then I believe we should clarify the law, and that is the reason that I support this change.

I am sure you do not wish to handicap any enterprising, ambitious, basic

producer, basic prospector-businessman, and I am sure that you realize that the materials that we are dealing with, gypsum and these other nonmetallics, are the very foundation of the house we live in and the building we are standing in now, and to handicap the individual entrepreneur such as myself leaves us at the mercy of these ill-advised personnel. So I would heartily solicit the recommendation of this subcommittee that Senate bill 3485 be passed.

Senator GRUENING. Senator Metcalf?

Senator METCALF. I have no questions.

Senator GRUENING. Mr. Greeley, I think this is an important point. If we can have a decision that gypsum is not gypsum, where does that leave the industry in any respect if it can be decided that a locatable mineral is not what it is said to be? What guarantee and what sure test do the mining people have? This is an

extraordinary decision as presented by this witness.

Mr. GREELEY. This, I must confess, leaves me gasping.

Mr. KESSLER. I would hope that I could make an appointment with you before I leave Washington and perhaps we could get to where the trouble is here.

Mr. GREELEY. How is a quarter to two today?

Mr. KESSLER. That is fine.

Senator GRUENING. I think this spirit of cooperation is a very happy concluding note for this hearing.